

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Strafford Technology LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages/commissions
RSA 275:43 V unpaid vacation pay

Date of Hearing: May 4, 2015

Case No.: 49827

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$3,300 in unpaid commissions, a 4% commission on an \$82,500 sale (\$75,000 contract and \$7,500 setup fee) to Kadant Inc. that the employer told the business office to "just pay it". He also asserts that he is owed \$1,538.46 for forty hours of unpaid vacation pay that showed as available on his paycheck.

The employer argues that they did pay a 4% commission on the \$7,500 set up fee for the Kadant Inc. sale, which was offset by an educational loan to the claimant. They argue that the claimant is not due any further commissions on the remaining \$75,000 sale to Kadant Inc. because the claimant was not employed on the date the sale was completed. They assert that they were referring to another sale when they said "just pay it". The employer denies that the claimant is owed vacation pay under their written policy.

FINDINGS OF FACT

The claimant worked for the employer from April 29, 2014 through January 24, 2015, when the employer terminated his employment.

On January 19, 2015, the claimant gave notice to the employer of his intention to resign effective January 30, 2015.

The employer terminated the claimant's employment at a January 21, 2015, meeting. The claimant received his full salary through January 24, 2015, the end of the pay period. The employer notified his business partner, the Business Office Manager and Accounting Manager, via a January 21, 2015 email that "Rich is terminated effective the end of this week (Saturday). Last day work will be today. Adib, I have reviewed his accounts with him and have notes, he also has them well documented.", previously submitted.

The Hearing Officer does not find the claimant's argument that he did not know that the employer terminated his employment at the January 21, 2015, meeting, persuasive. The Hearing Officer finds the employer terminated the claimant effective January 24, 2015.

The claimant argues he is due forty hours of vacation pay for the week of January 26 through January 30, 2015.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly notified the claimant of the written policy regarding vacation pay and maintained on file an acknowledgement signed by the claimant on May 14, 2014. The written policy of the employer states, in relevant part, "You will not be paid for any unused personal time remaining at the end of your employment with Strafford Technology." and "There will be no wages or salary paid to you in lieu of a vacation." The employer uses the terms personal time and vacation time interchangeably in the written policy. Both terms refer to the same bank of time.

The Hearing Officer finds the claimant failed to prove he is due any vacation pay under the written policy of the employer.

The claimant argues he is due \$3,300 in commission for an \$82,500 cloud fee contract sold to Kadant Inc. (\$7,500 set up fee and \$75,000 sale).

The employer provided credible testimony that the claimant had received credit for the \$7,500, which had then been offset by an educational advance provided to the claimant.

The claimant had no recollection of the setup fee being paid and offset by the educational advance.

The Hearing Officer does not find the claimant's argument he did not recall receiving the commission for the setup fee persuasive.

The Hearing Officer finds the employer paid the claimant his commission on the \$7,500 setup fee.

The parties agree that the claimant sold a contract worth \$75,000 to Kadant Inc. November 21, 2014. The agreement contained a number of requirements the employer needed to provide by dates certain in order for Kadant Inc. to continue with the service. The employer did not meet those benchmarks until February 2015. The agreement then became finalized and the employer invoiced Kadant Inc. for the services on March 24, 2015 for services between March 1, 2015 and February 29, 2016, payable on a monthly basis.

The employer argues the sale did not close until the benchmarks were met. As this occurred after the claimant's employment ended, they argue he is not due any commission. The employer agreed the claimant would have received commission on the sale had he still been employed at the time of the invoicing.

RSA 275:49 I requires that an employer inform employees of the rate of pay, including commissions, at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer provided the following written policy to the claimant, in relevant part, "Commissions on cloud sales revenue are paid in the bonus payroll of the month following when it was invoiced."

The New Hampshire Supreme Court, in Bryan K. Galloway v. Chicago-Soft, Ltd. 142 NH 752, established a "general rule" regarding commission sales that states, "a person employed on a commission basis to solicit sales orders is entitled to his commission when the order is accepted by his employer. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped. This general rule may be altered by a written agreement by the parties or by the conduct of the parties which clearly (*emphasis in original*) demonstrates a different compensation scheme".

The employer's argument that the sale had not closed until after the claimant separated from employment is not persuasive. The general rule states that a commission is earned when the order is accepted, not upon closure of the sale. The employer did not alter the general rule to state that commissions are earned other than when accepted by the employer, New England Homes Inc. v RJ Guarnaccia Irrevocable Trust & a 150 NH 732.

The court further opined in New England Homes Inc. v RJ Guarnaccia Irrevocable Trust & a 150 NH 732, that "The mere existence of post-acceptance responsibilities does not unambiguously demonstrate that commissions are earned at some other time than when orders are accepted."

The employer did not alter the general rule by written agreement to demonstrate a different compensation scheme. The fact that the requirements were met after the claimant is irrelevant as the employer did not alter the general rule to require the claimant to be an active employee in order to receive the commission payment. The employer also did not alter the general rule to change when the commission was earned.

The Hearing Officer finds that the employer accepted the order and the commission was earned when the agreement was signed on November 21, 2014.

Therefore, the Hearing Officer finds that the claimant proved by a preponderance of the evidence that he is owed the commissions of 4% on the \$75,000 Kadant Inc contract, or \$3,000.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that he is owed a portion of the claimed commissions/wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$3,000.

As RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$3,000, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: June 3, 2015
MJD/kdc